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## The New Common Law: Courts, Culture, and the Localization of the Model Penal Code

Anders Walker

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# The New Common Law: Courts, Culture, and the Localization of the Model Penal Code

ANDERS WALKER\*

*Few tropes in American legal teaching are more firmly entrenched than the criminal law division between Model Penal Code and common law states. Yet even a cursory look at current state codes indicates that this bifurcation is outmoded. No state continues to cling to ancient English common law, nor does any state adhere fully to the Model Penal Code. In fact, those states that adopted portions of the Code have since produced a substantial body of case law—what this Article terms “new common law”—transforming it. Taking the controversial position that criminal law pedagogy is antiquated, this Article proposes a radical update, emphasizing two objectives: (1) the need to stress the interplay between individual state cases and codes, and (2) the need to abandon the position that the Model Penal Code represents a bold new vision of criminal law reform, particularly since that vision is itself almost half a century old.*

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## INTRODUCTION

Few tropes in American legal teaching are more firmly entrenched than the criminal law division between Model Penal Code ("MPC") and common law states. Yet even a cursory look at current state codes indicates that this bifurcation is outmoded. No state continues to cling to ancient English common law, nor does any state fully adhere to the MPC. In fact, those states that adopted portions of the MPC have since produced a substantial body of case law—what this Article terms "new common law"—transforming it. Taking the controversial position that criminal law pedagogy is antiquated, this Article proposes a radical update, emphasizing two objectives: (1) the need to stress the interplay between individual state codes and cases, and (2) the need to abandon the position that the MPC represents a bold new vision of criminal law reform, particularly since that vision is itself almost half a century old.

To illustrate, this Article will proceed in four parts. Part I interrogates the myth of the "common law" state, showing that few, if any, states continue to abide by judicially created law heralding from Elizabethan England. Part II interrogates the myth of the MPC state, showing that no state adopted the MPC in its entirety, nor did any state

adopt its most ambitious reforms, making the study of the MPC as a free-standing code misleading. Part III looks even more closely at so-called MPC states, showing how every state that did adopt portions of the MPC has since developed its own *new* common law interpreting it. Part IV examines the theoretical implications of looking more closely at the new common law, arguing that it leads to a more precise pedagogy, as well as a more empirically minded, culturally rooted understanding of how the criminal law actually works.

At its core, American criminal law reflects a sedimentary deposit of localized, state-level, majoritarian politics. While scholars such as William Stuntz have derided such politics, even criticizing them as “pathological,”<sup>1</sup> this Article argues that they are, in fact, an inevitable symptom of democratic rule. To rail against them, this piece maintains, is at once antidemocratic and futile. Even if the drafting of criminal legislation were handed over to politically insulated experts, as scholars such as Stuntz and Paul Robinson argue it should be,<sup>2</sup> judges would still bend that law to conform to majority will, imposing a new common law onto even the most politically insulated, utilitarian codes.

Beneath this Article’s endorsement of a new common law approach to criminal law lies a larger challenge to the political and pedagogical assumptions underlying legal education generally in the United States. Perhaps foremost among these assumptions is the notion that state and local law is somehow less significant, less interesting, and ultimately less worthy of attention than national law. Put simply, whenever national law can be taught, it is; and whenever national law cannot be taught because it does not exist, then fictional models are used.<sup>3</sup> Though convenient for scholars who look down on state law as inferior, such an approach leads to imprecision and, this Article maintains, a false sense of law’s very nature.

For example, most casebook authors presume that the fields of psychology and utilitarian philosophy are best suited for explaining criminal law and guiding criminal law reform.<sup>4</sup> Implicit in such an

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1. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–12 (2001).

2. See *id.* at 582–83; Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 652–53 (2005).

3. See Douglas A. Berman, *The Model Penal Code Second: Might “Film Schools” Be in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 163, 165 (2003); Russell Covey, *Should We Stop Teaching the Model Penal Code?*, PRAWFSBLAWG (July 25, 2006), [http://prawfsblawg.blogs.com/prawfsblawg/2006/07/should\\_we\\_stop\\_.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/07/should_we_stop_.html).

4. See generally RICHARD J. BONNIE ET AL., CRIMINAL LAW (2d ed. 2004); GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2002); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (5th ed. 2009) [hereinafter DRESSLER, CASES]; MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS (2005); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS (5th ed. 2004); WAYNE R. LAFAYE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS (3d ed. 2001) [hereinafter LAFAYE, CASES]; CYNTHIA LEE & ANGELA

approach, however, is the view that democratic majorities do not, in fact, know what is best for them. Indeed, some criminal law scholars have made this point explicit, arguing for the de-politicization of the criminal law-making process.<sup>5</sup>

While criminal law casebooks reinforce the notion that electoral majorities are inept, few fields of legal practice rely more heavily on a lawyer's ability to understand local majority sentiment than does criminal law.<sup>6</sup> Whether experts disprove of average people or not, it is average people who decide the outcome of criminal cases, and consequently it is average people who inform an attorney's decision to proceed to trial or accept a plea bargain.<sup>7</sup> Further, until the moment that criminal law scholars succeed in overturning democratic government, average people retain the power to change the law through the electoral process.<sup>8</sup> Law students should be exposed to the methodologies of legal history and legal anthropology, both of which focus on the ascertainment and analysis of local practice, local knowledge, and local community norms, rather than abstract theory.<sup>9</sup> Unless criminal law scholars accept the relevance of such methodologies to the explication of their field, law students will find themselves increasingly deprived of even a basic understanding of how judicial opinions and legislative actions operate together to construct and reconstruct criminal offenses.

## I. THE MYTH OF THE COMMON LAW STATE

One of the most presumptive pillars of American criminal law courses is the common law state.<sup>10</sup> Criminal law casebooks, hornbooks, and even commercial outlines all agree that while some states can best be characterized as MPC states, others are best designated as common law.<sup>11</sup>

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HARRIS, CRIMINAL LAW: CASES AND MATERIALS (2005); PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (2005); LLOYD L. WEINREB, CRIMINAL LAW: CASES, COMMENT, QUESTIONS (7th ed. 2003).

5. See generally Stuntz, *supra* note 1; Robinson & Cahill, *supra* note 2.

6. See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839-40 (2000).

7. See *id.* at 1852, 1857.

8. See *id.* at 1868.

9. See generally BONNIE ET AL., *supra* note 4; RONALD N. BOYCE, DONALD A. DRIPPS & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE (9th ed. 2004); DIX & SHARLOT, *supra* note 4; DUBBER & KELMAN, *supra* note 4; KAPLAN ET AL., *supra* note 4; LAFAYE, CASES, *supra* note 4; LEE & HARRIS, *supra* note 4; ROBINSON, *supra* note 4; WEINREB, *supra* note 4; Henry M. Hart, Jr. *The Aims of the Criminal Law*, in DRESSLER, CASES, *supra* note 4, at 1-2.

10. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 27-31 (3d ed. 2001) [hereinafter DRESSLER, UNDERSTANDING] (considering in detail both the common law and the MPC); WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW 66-67 (2d ed. 2010) [hereinafter LAFAYE, PRINCIPLES]. See generally STEVEN L. EMANUEL, CRIMINAL LAW (5th ed. 2003) (noting distinctions between common law and MPC states on the topics of mistake, proximate cause, duress, necessity, attempt, conspiracy, and accomplice liability).

11. See sources cited *supra* note 10.

Yet few agree on what precisely this means. According to criminal law scholar Joshua Dressler, for example, common law states originally enforced judge-made crimes derived from England.<sup>12</sup> Yet, Dressler argues, “[m]ost states, often by statute, have abolished common law crimes,” meaning that even in so-called common law states, “[t]he legislature is the pre-eminent lawmaking body in the realm of criminal law,” and courts do not originate law so much as interpret it.<sup>13</sup>

If legislatures are the “pre-eminent” lawmaking bodies in America, why bother with the fiction of the common law state? According to some, even though all states boast a criminal code, some have nevertheless “retained” respect for the ancient common law, particularly in cases where common law crimes are not mentioned in state codes.<sup>14</sup> If a state has a “reception” statute, in other words, then prosecutors can successfully charge defendants with crimes that are not enumerated in their state’s criminal statutes so long as those crimes are mentioned in Blackstone’s *Commentaries* or relate to an English case directly on point decided before 1607.<sup>15</sup>

How often does this happen? According to Joshua Dressler, such prosecutions are “rare.”<sup>16</sup> Criminal law scholar Wayne LaFave agrees, noting that prosecutions for common law crimes are not only few and far between, but have tended to involve idiosyncratic, nineteenth century-style offenses, including for example “being a common scold,” “maliciously killing a horse,” and “burning a body in [a] cellar furnace.”<sup>17</sup>

Given their rarity, do reception statutes warrant the attention of first-year criminal law students, whose task it is to gain an introduction to the most important aspects of the criminal law? Probably not, particularly because the vast majority of states reject them.<sup>18</sup> However, there remains one more reason why the pedagogical trope of the common law state may exist. According to Dressler, some states have rejected reception statutes but still “codified the common law felonies,” meaning that they employ common law terms to explicate their criminal

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12. DRESSLER, UNDERSTANDING, *supra* note 10, at 27 (noting that in English common law “the definitions of crimes and the rules of criminal responsibility were promulgated by courts rather than by the Parliament”).

13. *Id.* at 28.

14. LAFAVE, PRINCIPLES, *supra* note 10, at 66 (noting that some states continue to accept the ancient common law of England “either by an express ‘reception statute’ or without the aid of any statute”).

15. See Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 363 (1983); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1382 (1996).

16. DRESSLER, UNDERSTANDING, *supra* note 10, at 28.

17. LAFAVE, PRINCIPLES, *supra* note 10, at 67.

18. *Id.* at 67.

statutes.<sup>19</sup> Hence, it is important to retain some memory of the common law, presumably so that students can understand the law in those states that codified the common law.

Is this really true? As this Part will demonstrate, most crimes enumerated in American state codes—including classic common law crimes like murder—possess just as many distinguishing American characteristics as English ones, rendering arguments that American students need to understand ancient English common law nonsensical. Indeed, this Part posits that the only unifying factor shared by so-called common law states is not whether they preserved retention statutes or codified the common law, but that they rejected the MPC. Currently, only fourteen states in the union refuse to incorporate any portion of the MPC into their statutory criminal law, making all but one of them (Louisiana), by default, “common law states.”<sup>20</sup> Included are California, Idaho, Maryland, Massachusetts, Michigan, Mississippi, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, and Louisiana.<sup>21</sup> The last state, Louisiana, derives its code directly from French civil law, meaning that it is perhaps best described as an indigenous, non-MPC code state rather than a common law state.

Perhaps ironically, the same could be said for the remaining fourteen states that rejected the MPC. All are arguably better described as indigenous code states than common law states. To illustrate, it is helpful to look at how those fourteen states that did not adopt the MPC treat homicide.<sup>22</sup>

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19. DRESSLER, UNDERSTANDING, *supra* note 10, at 29.

20. For a compilation of states that adopted the MPC, see Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 Sw. U. L. REV. 229, 229–30 & n.2 (1997).

21. *Id.*

22. Under English common law, murder originally applied to both intentional and unintentional killings. Leonard Birdsong, *Felony Murder: A Historical Perspective By Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 4 (2006). In the 1820s, however, Parliament enacted a statute carving out an exception to murder for cases where defendants claimed benefit of clergy, creating the statutory lesser-included offense of manslaughter. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 215–16 (Robert Malcom Kerr ed., 1962) (1765–69) (describing 9 GEO. 4, c. 31, § 9); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 620 (2009). While law professors may say that English statutes should be considered part of the English common law because they come from England, this confuses the notion of what, precisely, the common law is. Is it judge-made or is it English? Casebook authors maintain that it was judge-made, but in many cases it was not. This means that it is probably better to think of it simply as English law. Yet, if it is simply English law, then why not distinguish between English law—statutory and judge-made—and American law? Of course, to concede that there may have been an American criminal law that preceded the MPC would undermine the assumption, implicit in American casebooks, that pre-MPC law was an archaic remnant of the eighteenth century, much in need of an overhaul. However, core aspects of American “common law” regimes are decidedly American innovations, with little antecedent in either English law or judge-made law.

## A. MURDER

Under English common law, murder was not divided into degrees, but rather included simple distinctions between intentional killings done with “malice aforethought,”<sup>23</sup> and unintentional killings, known as manslaughter.<sup>24</sup> Yet, out of the fourteen states that rejected the MPC, only six employ the English common law term “malice aforethought.”<sup>25</sup>

Of those states that continue to employ malice aforethought, all but one (South Carolina) divide the offense into first and second degrees<sup>26</sup>—something the English common law did not do—and subsequently rely on uniquely American language to ascertain what, precisely, constitutes murder. The most commonly cited language comes from Pennsylvania, which divided murder and manslaughter into degrees in 1794, declaring that any killing done in a “willful, deliberate, and premeditated” manner warranted classification as murder in the first degree.<sup>27</sup>

While criminal law casebooks and hornbooks concede that Pennsylvania has influenced many American states, they continue to cling to the common law divide, omitting any discussion of additional non-judge-made criteria that so-called common law states use to determine what precisely constitutes first degree murder.<sup>28</sup> For example, Rhode Island declares that “[t]he unlawful killing of a human being with malice aforethought is murder,” a nod to English common law, but then goes on to distinguish first degree murder by including instances where a killing is committed “against any law enforcement officer in the performance of his or her duty or committed against an assistant attorney general or special assistant attorney general in the performance

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23. BLACKSTONE, *supra* note 22, at 217–18. Incidentally, the history of the crime of murder in England raises questions about the extent to which even English “common law” was court generated. Prior to the reign of Edward III, for example, murder in England focused primarily on the killing of Danes by English natives, a crime for which entire communities could be punished. *Id.* at 217. Edward changed this policy by statute, introducing the current definition of killing by “malice aforethought.” *Id.*

24. *Id.* at 216.

25. The six states are California, Massachusetts, Nevada, Oklahoma, Massachusetts, Rhode Island, and South Carolina. CAL. PENAL CODE § 187 (West 2008); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2008); NEV. REV. STAT. ANN. § 200.010 (West 2009); OKLA. STAT. ANN. tit. 21, § 701.7 (West Supp. 2011); R.I. GEN. LAWS. § 11-23-1 (Supp. 2010); S.C. CODE ANN. § 16-3-10 (1985). California actually incorporated malice aforethought after it adopted New York’s Penal Code in 1872. See Sanford H. Kadish, *The Model Penal Code’s Historical Antecedents*, 19 RUTGERS L.J. 521, 537 (1988).

26. The only state that does not divide murder into first and second degrees is South Carolina. S.C. CODE ANN. § 16-3-10 (1985).

27. Edwin R. Keady, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 771–72 (1949).

28. See DRESSLER, UNDERSTANDING, *supra* note 10, at 508–11; DRESSLER, CASES, *supra* note 4, at 1–2. See generally BONNIE ET AL., *supra* note 4; DIX & SHARLOT, *supra* note 4; DUBBER & KELMAN, *supra* note 4; KAPLAN ET AL., *supra* note 4; LAFAYE, CASES, *supra* note 4; LEE & HARRIS, *supra* note 4; ROBINSON, *supra* note 4; WEINREB, *supra* note 4.



of his or her duty.”<sup>29</sup> This last provision, protecting prosecutors and police, is neither a product of the Pennsylvania model nor the English common law, but rather of the legislative and political history of Rhode Island.

Nevada is similar. Even while clinging to malice aforethought for murder generally, Nevada distinguishes first degree murder by limiting it to cases where the killing is “[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person.”<sup>30</sup> While many of the above fall under the doctrine of felony murder, this does not necessarily mean that they therefore derive from the common law of England. Indeed, criminal law scholar Guyora Binder has shown that felony murder does not in fact derive from England at all, meaning that it is just as much an American doctrine as a British one.<sup>31</sup>

Further, Nevada’s additional provisions for first degree murder are also American. In Nevada, first degree murder includes killings that take place “on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties.”<sup>32</sup> Such attendant circumstances are unique to Nevada and are not products of English common law, forged in an era long before children rode buses to school.

Similarly unique circumstances rear their heads in other states as well. In Massachusetts, for example, any killing done with “deliberately premeditated malice aforethought”—an odd combination of the Pennsylvania and common law definitions—is first degree murder, as well as any killing committed “with extreme atrocity or cruelty.”<sup>33</sup> In Oklahoma, first degree murder includes any killing done with malice aforethought as well as any killing done in conjunction with child abuse, a particularly despicable crime for which a different mens rea term is used: “the willful or malicious injuring, torturing, maiming or using of unreasonable force” on a child.<sup>34</sup>

California also distinguishes between first and second degree murder by attendant circumstances, including whether the killing was done “by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to

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29. R.I. GEN. LAWS § 11-23-1 (Supp. 2010).

30. NEV. REV. STAT. § 200.030 (2009).

31. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004) (covering the American origins of the felony murder rule).

32. NEV. REV. STAT. § 200.030 (2009).

33. MASS. GEN. LAWS ch. 265, § 1 (West 2008).

34. OKLA. STAT. ANN. tit. 21, § 701.7 (West Supp. 2011).

inflict death.”<sup>35</sup> This statute was enacted in 1993<sup>36</sup> after a string of drive-by shootings in Los Angeles during the late 1980s and early 1990s.<sup>37</sup> Republican Governor Pete Wilson supported the law,<sup>38</sup> and even gang-members themselves attempted to stop the practice.<sup>39</sup> For example, only a few months after the statute’s enactment, two hundred members of Los Angeles area “warring gangs” called for a stop to drive-by shootings, some threatening shooters with retribution in prison.<sup>40</sup> The Mexican Mafia, known simply as “La EME” or “the letter M,” “ordered thousands of Latino gang members to halt drive-by shootings” in the Los Angeles area.<sup>41</sup>

Though California’s drive-by statute reflects a particular aspect of local culture in Los Angeles, criminal law casebooks continue to portray California as a common law state, implying that it somehow continues to adhere to English common law. On the contrary, however, California’s clear allusion to gang-related violence represents the kind of unique circumstance that distinguishes American from English law. To tell students that murder in each of these states is based simply on ancient English notions of malice aforethought is wrong.

Despite malice aforethought’s continued presence in American casebooks, most so-called common law states do not employ the term at all, making its pedagogical relevance even more questionable. To take just a few examples, Idaho—also presumably a common law state—incorporated the Pennsylvania model but, unlike California, rejected the term malice aforethought, adding instead a series of its own mens rea components. These include murder done with the “intent” to “execute vengeance,” “extort something from the victim,” or “satisfy some sadistic inclination,” none of which appeared in the English common law.<sup>42</sup> Vermont, another common law state, also rejected malice aforethought, but included none of the additional mens rea requirements that emerged in California or Idaho, simply relying on “willful, deliberate, and

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35. CAL. PENAL CODE § 189 (West 2008).

36. *Id.*

37. 3 Killed, 6 Injured in 2 Drive-By Shootings, L.A. TIMES, Apr. 8, 1993, at 4; Gregory Crouch, Drive-By Shootings in 2 Cities Leave 3 Men Wounded, L.A. TIMES, June 11, 1989, at 12; Wendy Paulson, Drive-By Shootings Raise Police Alarm, L.A. TIMES, July 23, 1990, at 2; Drive-by Shootings Wound 4, Including 2 Young Children, L.A. TIMES, May 26, 1988, at 4; Woman Killed and 6 Injured in Drive-By Shootings, L.A. TIMES, July 11, 1988, at 2.

38. Richard Howland, Gangs Face Tougher Punishment: New Law Will Hike Drive-By Penalties to 20 Years to Life, LONG BEACH PRESS-TELEGRAM, Sept. 30, 1993, at A1.

39. David A. Avila & Davan Maharaj, Santa Ana Gang Members Step Outside Turf, Call for Peace, L.A. TIMES, Oct. 2, 1993, at 1; Mary Anne Perez, Issue: Drive-By Shootings, L.A. TIMES, Aug. 22, 1993, at 23.

40. Avila & Davan, *supra* note 37.

41. *Id.*

42. IDAHO CODE ANN. § 18-4003 (2004).

premeditated killing.”<sup>43</sup> Mississippi drafted first degree murder to include killing “done with deliberate design,” a unique rendition of the Pennsylvania model.<sup>44</sup> In Vermont and Michigan, murder must be committed by “willful, deliberate, and premeditated killing,” again direct takes on the Pennsylvania model.<sup>45</sup>

The tired pedagogical technique of using malice aforethought as a foil for the MPC should be brought to an end as it applies only to six states and is therefore grossly unrepresentative. However, defenders of the common law fiction will invariably mention South Carolina—the only state that does not divide murder into degrees—as a living, if lonely, embodiment of England’s legacy. Yet even South Carolina includes uniquely American language within its definition of murder, including “[k]illing by stabbing or thrusting,” a capital crime applicable to instances where the victim “has not then any weapon drawn” or “has not then first stricken” the defendant.<sup>46</sup> Of course, there is a statutory exception for anyone who happens to cause death while “chastising or correcting his child,” rendering the stabbing manslaughter.<sup>47</sup>

#### B. GRADING SCHEMES FOR OTHER FELONIES

Is murder the only area where so-called “common law states” depart significantly from the ancient English common law? No. While most criminal law casebooks recognize the Pennsylvania innovation when it comes to murder, they fail to discuss similar grading schemes, all uniquely American, which apply to other offenses.<sup>48</sup> In the nineteenth century, American states developed grading schemes for the most violent felonies, not just murder. By 1857, for example, the New York legislature had graded the offenses of burglary, arson, and robbery, substantially transforming the common law definitions of each.<sup>49</sup>

Interestingly, Pennsylvania did not grade its violent nonhomicide felonies until after New York, while New York did not grade murder

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43. VT. STAT. ANN. tit. 13, § 2301 (2009).

44. MISS. CODE ANN. § 97-3-19(1)(a) (2006).

45. MICH. COMP. LAWS § 750.316 (2011); VT. STAT. ANN. tit. 13, § 2301 (2009).

46. Indeed, only one state—South Carolina—continues to define murder in the old common law fashion, refusing to divide it into first or second degrees. Yet, even there legislators have carefully introduced uniquely American qualifiers, adding for example an extra penalty if the murder was committed “within a radius of one hundred yards of the grounds of a public or private childcare facility.” S.C. CODE ANN. § 63-13-200 (2010).

47. *Id.*

48. DRESSLER, CASES, *supra* note 4, at 236–37.

49. FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW AND A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT, AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, VIRGINIA, AND OHIO WITH THE DECISIONS ON CASES ARISING UPON THOSE STATUTES, 682–83, 706–07, 716–17 (4th ed. 1857).

until 1860, over half a century after Pennsylvania.<sup>50</sup> Therefore, to say that New York followed the Pennsylvania model would not be entirely correct, as it graded its violent felonies prior to the Quaker State. In fact, in regards to felonies other than murder, it would probably be more correct to say that Pennsylvania followed New York, for by the time New York graded its felonies, Pennsylvania still graded only murder.<sup>51</sup> Just as there was a Pennsylvania model for murder, in other words, so too was there arguably a separate New York model for burglary, arson, and robbery, one that so-called common law states have all tended to follow.

Other criminal statutes similarly reflect the failure of so-called common law states to follow English common law, with statutory rape perhaps foremost among them.<sup>52</sup> Inspired by a 1576 statute enacted in Elizabethan England, for example, in 1869 North Carolina established the age of consent for statutory rape at ten.<sup>53</sup> By 1917, however, North Carolina raised this age to twelve, increasing it again to sixteen in 1923.<sup>54</sup> Rather than a faithful representation of ancient English common law, in other words, the Tarheel State's age of consent reflected insecurities about teenage behavior immediately after World War I, the height of the jazz age.

Even states that did not adopt the MPC participated in the process of codification and transformation.<sup>55</sup> Massachusetts provides an example. By 1857, Massachusetts had codified the crime of kidnapping to include "forcibly carrying" persons against their will "out of [the] state" and, also, "secretly confining or imprisoning" any person "against [his] will."<sup>56</sup> The English common law considered the act of confining to constitute false imprisonment instead of kidnapping.<sup>57</sup> Why Massachusetts decided to incorporate false imprisonment into its statute on kidnapping is not clear, though the innovation caught on in other common law states like Idaho, which includes in its statute anyone who "confines" a victim "secretly," even as it follows the non-common law practice of grading.<sup>58</sup>

Perhaps because American kidnapping confuses the English common law concept of false imprisonment, it is not discussed at length in criminal law casebooks. Yet even crimes that are mentioned in criminal law casebooks have been altered in common law states, as we

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50. See generally Herbert Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

51. See WHARTON, *supra* note 49, at 682–83, 706–07, 716–17.

52. Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1547, n.155 (1998).

53. *Id.*

54. *Id.*

55. See *supra* text accompanying notes 21–23.

56. WHARTON, *supra* note 49, at 596.

57. BLACKSTONE, *supra* note 22, at 218.

58. IDAHO CODE ANN. § 18-4501 (2004).

have seen with murder.<sup>59</sup> Further, such alterations extend to almost all specific common law offenses through the American statutory process of grading. Put simply, few if any common law crimes exist in their original common law form, confounding the analytic category of the common law state. In the next Section, an explanation for why law teachers persist in the fiction of the common law state will be advanced, one rooted less in pedagogy than politics.

### C. POLITICS OF LEGAL PEDAGOGY

Keeping the above examples in mind, why do criminal law professors and criminal law casebooks persist in the fiction of the common law state?<sup>60</sup> Part of the story lies in the politics of legal pedagogy. Prior to 1940, criminal law casebooks consisted—as their names suggest—almost entirely of cases.<sup>61</sup> Renowned criminal law professors such as the University of Chicago's Joseph Henry Beale included anywhere from six to nine cases per topic in their casebooks, omitting any mention of law review articles, philosophical treatises, or sociological studies.<sup>62</sup> This meant that before a student covered a subject, say provocation or self-defense, he walked through at least six factual scenarios and six legal conclusions, from which he could then synthesize a formal legal rule.<sup>63</sup>

Beginning in the 1930s, a young Columbia law professor named Herbert Wechsler began to change this.<sup>64</sup> Convinced that Beale's case method tended to produce overly conservative, narrow-minded attorneys, Wechsler worked with a colleague, Jerome Michael, to produce a new kind of criminal law casebook, one that dramatically reduced the number of cases students had to read, substituting in their place bits of law review articles, paragraphs from major philosophical treatises, and statistical studies.<sup>65</sup>

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59. For example, North Carolina, one of the states commonly cited as a common law state, significantly altered the English common law definition of rape by refusing to require that victims forcibly resist their attackers. In 1946, the North Carolina Supreme Court noted that in cases where victims suffered from "fear, fright, or coercion," a showing of actual force by the defendant was not necessary. *State v. Thompson*, 40 S.E.2d 620, 623 (N.C. 1946). Despite the divergence between so-called common law states and the ancient common law of England, scholars may still argue that certain American states still recognize the common law of England as a formal matter, and even allow for punishment of noncodified, common law crimes. See LAFAYE, PRINCIPLES, *supra* note 10, at 66. Rhode Island is an example. R.I. GEN. LAWS § 11-1-1 (2002) (adopting common law crimes).

60. See, e.g., DRESSLER, CASES, *supra* note 4, at 4; LAFAYE, CASES, *supra* note 4.

61. See generally, e.g., JOSEPH HENRY BEALE, JR., A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW (1894); see also Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 221 (2009) [hereinafter Walker, *Anti-Case Method*].

62. See Walker, *Anti-Case Method*, *supra* note 61, at 221.

63. *Id.*

64. *Id.* at 218.

65. *Id.* at 225–29.

To Wechsler's mind, substituting outside materials for cases promised to change the way that students thought about law. Rather than learning to revere legal opinions, Wechsler hoped students would come to criticize them.<sup>66</sup> Regularly, Wechsler included notes that prompted students to question the normative basis of judicial opinions, at times even mocking judicial deference to precedent and English common law.<sup>67</sup> Though such an iconoclastic approach risked leaving students confused and arguably even unprepared for the criminal bar, Wechsler did not particularly care whether his students entered criminal practice.<sup>68</sup> In fact, the administration at Columbia joined him in discouraging students from becoming criminal lawyers, partly because the field tended to be low paying, but also because defense attorneys tended to be associated with the criminal element and prosecutors tended to become politically compromised.<sup>69</sup>

Enter the modern criminal law casebook. Seizing an opportunity to nudge criminal law away from practitioners and towards future "legislators," Wechsler published his book in 1940 to widespread acclaim, dramatically—perhaps even tragically—influencing an entire generation of law students.<sup>70</sup> Foremost among such students was a young Navy veteran named Sanford Kadish, who took Wechsler's criminal law course in 1946 and, inspired by Wechsler's law and society approach, then went on to produce his own iconic, Wechsler-inspired text in 1962.<sup>71</sup>

Why are Kadish and Wechsler relevant to understanding the division between common law and MPC states? From 1952 to 1962 Wechsler served as the Reporter for the American Law Institute's ("ALI") Model Penal Code project, overseeing the creation of the code, a production that younger scholars like Kadish reverently emphasized in their casebooks.<sup>72</sup> Completed in 1962, the MPC introduced a series of revisions to criminal law definitions that, presumably, had themselves come directly from the ancient common law of England. In fact, the MPC *Commentaries* repeatedly referenced the "Common-Law Background" of American criminal law, using it as a foil for the innovations introduced by the MPC.<sup>73</sup> To anyone unfamiliar with the statutory nuance of American criminal codes, the MPC *Commentaries* themselves made it logical to distinguish between MPC states and common law states, a divide that scholars like Kadish imported into their

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66. *Id.*

67. *Id.* at 230.

68. *Id.* at 230–31.

69. *Id.*

70. *Id.* at 245.

71. *Id.* at 238–44.

72. *Id.* at 237, 241–42.

73. See, e.g., MODEL PENAL CODE AND COMMENTARIES § 210.3 cmt. 1 (1980).

casebooks.<sup>74</sup> Though much of that law was itself codified, Kadish chose to refer to states that either did not adopt the MPC or had yet to adopt it as “common law,” not code, states.<sup>75</sup>

## II. THE MYTH OF THE MODEL PENAL CODE STATE

While thirty-four states adopted portions of the MPC, no state adopted all of it.<sup>76</sup> Even states that adopted much of it—New York, Illinois, and Missouri are examples—tended to amend MPC definitions with new legislation.<sup>77</sup> Why? A brief look at the archaeology of state codes indicates that those portions of the MPC that challenged local, cultural values tended to fail, while those sections that simply reiterated what many people already felt tended to succeed. This rendered so-called “MPC” states hybrid regimes that enjoyed some of the modern innovations provided by the MPC, yet retained distinctive aspects of older, more local law.<sup>78</sup>

### A. INCHOATE OFFENSES

To illustrate, one of the MPC’s most heralded reforms was a recommendation that inchoate offenses—conspiracy, attempt, and so on—be punished just as harshly as completed offenses, a rule that coincided nicely with the instrumentalist view that individuals who attempted to commit crimes were just as dangerous as individuals who completed crimes.<sup>79</sup> Yet no state adopted the rule, indicating that voters were simply not willing to jettison traditional notions that individuals who completed crimes were guiltier than those who did not.<sup>80</sup> Similarly, no state adopted the MPC’s elimination of the overt act requirement in conspiracies chargeable as first or second degree offenses.<sup>81</sup> Traditionally,

74. Walker, *supra* note 61, at 241–42.

75. Kadish, *supra* note 25, at 537.

76. For a compilation of states that adopted the MPC, see Holley, *supra* note 20, at 229 & n.2.

77. See, e.g., ROBINSON & CAHILL, *supra* note 2, at 640 (describing legislative amendments to Illinois’s criminal code that undermined MPC definitions).

78. Of course, that MPC states actually possess a mélange of old statutory language raises questions about the legitimacy of designating certain states “MPC states” to begin with, particularly because those portions of the MPC that were rejected tended to leave significant areas of law up to prior definition, making the states hybrid regimes at best.

79. See generally MARKUS D. DUBBER, *THE MODEL PENAL CODE* (2004).

80. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 340–41 (2007).

81. Examples of state statutes requiring overt acts include: ALA. CODE § 13A-4-3 (LexisNexis 2005); ALASKA STAT. § 11.31.120 (2010); ARIZ. REV. STAT. ANN. § 13-1003 (2010); ARK. CODE ANN. § 5-3-401 (2006); COLO. REV. STAT. § 18-2-201 (2010); CONN. GEN. STAT. § 952-53A-48 (2011); DEL. CODE ANN. tit. 11, § 513 (2011); FLA. STAT. § 777.04 (2010); GA. CODE ANN. § 16-4-8 (2011); HAW. REV. STAT. § 705-520 (2009); 720 ILL. COMP. STAT. ANN. § 5/8-2 (West Supp. 2011); IND. CODE § 35-41-5-2 (2011); IOWA CODE ANN. § 706.1 (West 2003); KAN. STAT. ANN. § 21-3302 (2011); KY. REV. STAT. ANN. § 506.040 (West 2006); ME. REV. STAT. ANN. tit. 17-A, § 151 (2006); MINN. STAT. ANN. § 609.175 (West 2009); MO. REV. STAT. § 564.016 (2010); MONT. CODE ANN. § 45-4-102 (2010).

conspiracy required an agreement to commit a crime and an overt act in furtherance of that crime.<sup>82</sup> However, in an attempt to ramp up controls for future dangerousness, the MPC eliminated the overt act requirement for serious crimes,<sup>83</sup> transforming the offense into an Orwellian exercise in thought control. While some scholars praised this ultra-aggressive approach, all thirty-four states that adopted portions of the MPC balked.<sup>84</sup> Even New York and Illinois, both of which suffered longstanding problems with organized crime, rejected the MPC approach and held that an overt act must be proven for every grade of conspiracy, even the most serious.<sup>85</sup>

How can such digressions be rationalized? One likely explanation is that state legislators felt the MPC's innovations outstripped popular notions of how certain crimes should be punished. In the case of inchoate crimes like conspiracy and attempt, for example, the MPC may simply have appeared too harsh. Though the MPC's position was logically consistent with an emphasis on controlling dangerousness, its elevation of mental state above conduct appeared too much for legislators to accept, even for conspiracies that involved organized crime.

## B. CRIMES INVOLVING CHILDREN

Conversely, when crimes involved children, the public seemed more eager for punishment than the MPC. In a remarkable continuation of its emphasis on mental state, for example, the MPC allowed adults guilty of sleeping with minors to escape strict liability unless the child was ten years old or younger.<sup>86</sup> Unwilling to provide sex offenders such relief, a majority of states rejected the Code's statutory rape provision.<sup>87</sup> As we have seen, this very age had been contemplated by English law during the reign of Queen Elizabeth, and rejected by American common law states like North Carolina.<sup>88</sup> Instead, states set the age of victims at thirteen in some jurisdictions, and as high as seventeen in others.<sup>89</sup> For example, Missouri declared statutory rape chargeable to individuals who

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82. See sources cited *supra* note 81.

83. See MODEL PENAL CODE § 5.03(5) (1985).

84. See sources cited *supra* note 81.

85. N.Y. PENAL LAW §105.20 (2011); 720 ILL. COMP. STAT. ANN. § 5/8-2 (West Supp. 2011).

86. MODEL PENAL CODE § 213.1 (1985).

87. See Ross E. Cheit & Laura Braslow, *Statutory Rape: An Empirical Examination of Claims of "Overreaction,"* in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 85, 87–88 (Nancy E. Dowd et al. eds., 2006); 6 AM. JUR. 2d *Proof of Facts* § 4 (Supp. 2005). While the MPC's statutory rape provision represented an extremely low age, the MPC did not completely absolve defendants who had intercourse with females between the ages of ten and sixteen. So long as they were four years older, those individuals could be found guilty of a new crime: "Corruption of Minors," which constituted a third-degree felony, two grades lower than statutory rape, a felony of the first degree. MODEL PENAL CODE § 213.3 (1985).

88. BLACKSTONE, *supra* note 22, at 237–38 (citing 1 Hal. P.C. 631).

89. See, e.g., MO. REV. STAT. § 566.032 (2010).



had intercourse with minors under fourteen years of age.<sup>90</sup> Yet, a fourteen-year-old could, with the permission of a judge, enter into marriage and obviate the rule.<sup>91</sup> This "marital rape exemption" represented a direct reflection not of the MPC's emphasis on treatment, but of "a relic of the past," a type of shotgun wedding provision that presumed "girls are sure to be better off with a husband to look after them rather than be subjected to a life on welfare."<sup>92</sup> In fact, Missouri's treatment of sexual offenses like statutory rape reflects precisely the kind of local, cultural specificity that students miss when assigned either the MPC or English common law.

What larger lessons can be learned from looking at state rejections of MPC provisions on statutory rape, attempt, and conspiracy? Simply because states adopted portions of the MPC did not mean that they adopted all of the Code, or even its most distinctive sections. Further, denoting certain states as MPC states only obfuscates the fact that even those states most open to the MPC remained, in the final analysis, hybrids. Either they blended the MPC with older state codes, conflated state statutes with ancient English common law rules, or carved out their own, culturally distinct paths.

#### C. LOCAL POLITICS AND NEW YORK'S TREATMENT OF MURDER

Another area where the MPC failed to convince state legislatures was murder. Frustrated at state tendencies to reduce premeditation to an instant, the MPC's drafters collapsed first and second degree murder into a single offense, triggered whenever a defendant "causes the death of another human being" purposely, knowingly, or "recklessly under circumstances manifesting extreme indifference to the value of human life."<sup>93</sup> While the drafters retained some exceptions for the death penalty, all thirty-four states that adopted portions of the MPC rejected the Code's recommendations, choosing instead to preserve the distinction between first and second degree.

Often, the decision to preserve or expand first degree murder reflected local politics. New York provides an example. Out of all the states in the union that adopted portions of the MPC, New York should arguably have been the most pro-MPC, if for no other reason than that New York Governor Nelson Rockefeller assigned Wechsler to serve on

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90. *Id.*

91. *Id.*

92. Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 255, 258 (1997); see also BIENEN, *supra* note 52.

93. MODEL PENAL CODE § 210.1-210.2 (1985).

its Temporary Commission to Revise New York's Penal Law.<sup>94</sup> Though a supporter of the MPC, particularly the reduction of murder to one degree, Wechsler remained acutely aware of the political pressures that voters exerted in New York and subsequently tailored the code to local conditions.<sup>95</sup> To illustrate:

In 1961, New York was the last state in the Union to impose a mandatory death penalty for all cases of first degree murder. To Wechsler, any move to alter that law required holding "public hearings" in order to build popular support for legal change. Wechsler's interest in holding hearings reflected a democratic strain that ran through much of [New York's adoption of the MPC]. For example, at a Commission meeting on December 8, 1961, Wechsler warned that the "controversial" issue of the death penalty presented the Commission with a unique "problem" in that public attention to it far outweighed public interest in other aspects of the criminal law, for example notions of culpability, justification, and excuse. To avoid jeopardizing important reforms of the entire code, in other words, Wechsler advocated catering to popular opinion on the question of the death penalty "so as not to impede the progress of a lot of other work that will not be controversial." "My own view," continued Wechsler, "is that a careful effort should be made to separate these issues to which the public and the legislature are to be really divided."<sup>96</sup>

One issue that Wechsler feared might divide the public was the death penalty. To avoid a political backlash on the penalty, he recommended that the Commission "educate the legislature and the public," particularly on issues of sentencing.<sup>97</sup> He also lobbied in favor of retaining the death penalty, but only in two limited circumstances: (1) where a defendant killed a police officer "acting in the line of duty," and (2) where the defendant murdered a prison guard.<sup>98</sup>

For the most part, such attention to moderate reform and popular reception worked, engendering little political resistance. "From both sides of the aisle today," reported the *New York Times* on June 4, 1965, "were applause and lavish praise for the commission chairman, Republican Assemblyman Richard J. Bartlett."<sup>99</sup> Precisely because the Committee had been careful not to offend the public, even granting concessions to avoid backlash, it had been able to achieve substantive reform.<sup>100</sup>

Yet, the vagaries of popular opinion remained. Despite Wechsler's careful attention to popular caprice, the Commission's attempt to restrict

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94. Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1037 [hereinafter Walker, *American Oresteia*]

95. *Id.* at 1020.

96. *Id.* at 1042.

97. *Id.*

98. *Rockefeller Gets Bill on Abolition of the Death Penalty*, N.Y. TIMES, May 20, 1965, at 1.

99. John Sibley, *Assembly Passes a Total Revision of the Penal Law*, N.Y. TIMES, June 4, 1965, at 1.

100. *Id.*

the death penalty failed to withstand popular anger at criminals, particularly as crime rates began rising in the late 1960s.<sup>101</sup> In October 1968, for example, a legislative committee met in New York to decide whether to expand the scope of capital punishment.<sup>102</sup> Senator Edward Speno, the committee chair, announced that "many legislators" in New York had received "heavy mail" urging an expansion of cases where the penalty applied.<sup>103</sup> Much of this mail had been triggered by rising crime.<sup>104</sup> When New York City Controller Mario Procaccino called for a "get tough" policy on crime during a public hearing in Manhattan, including reinstatement of the electric chair for murderers, audience members cheered.<sup>105</sup> Conversely, "groans and cat-calls" inundated psychiatrist Henry Peckstein when he warned that "too much repressive legislation" could lead to a "fascist state."<sup>106</sup>

In 1971, New York state legislators extended capital punishment to anyone who killed a corrections officer "while he is performing his official duties."<sup>107</sup> In 1973, New York City mayoral candidate Mario Biaggi called for the execution of "hired assassins," "those responsible for the killing of a witness to a serious crime," and those who committed murder during a "rape, robbery, or kidnapping."<sup>108</sup> In 1977, such a law passed both the House and Senate, only to be vetoed by New York Governor Hugh Carey.<sup>109</sup> Four years and four vetoes later, the issue remained electric, this time with New York mayor and gubernatorial candidate Ed Koch declaring that whether the death penalty deterred or not, it "is vital that society be allowed to express its moral outrage at wanton killing."<sup>110</sup> In 1984, the New York Court of Appeals entered the fray and overturned the state's statute requiring capital punishment for offenders who killed while incarcerated, arguing that the mandatory death penalty was unconstitutional.<sup>111</sup>

Despite the court's ruling, popular initiatives to expand the death penalty continued into the 1980s. In 1989, a Democrat-led assembly voted to restore the penalty in cases of murder-for-hire, murder of police officers, murder of witnesses, or murder in the course of a "crime that

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101. See *infra* text accompanying notes 107-15.

102. Charles Grutzner, *Witnesses Clash on Death Penalty*, N.Y. TIMES, Oct. 4, 1968, at 21.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Summary of Bills Passed and Killed in Albany During the 1971 Legislative Session*, N.Y. TIMES, June 10, 1971, at 34.

108. Thomas Ronan, *Biaggi Asks Death for Some Crimes*, N.Y. TIMES, Sept. 16, 1973, at 53.

109. David Bird, *Death-Penalty Bill Is Vetoed by Carey*, N.Y. TIMES, July 13, 1977, at A1.

110. E.J. Dionne, Jr., *The Politics of Death Still Thrive*, N.Y. TIMES, June 6, 1982, at E6.

111. David Margolick, *Court Overturns Death Sentence in New York Law*, N.Y. TIMES, July 3, 1984 at A1.

threatens many peoples' lives."<sup>112</sup> Governor Mario Cuomo vetoed the law, declaring that even though life had become "ugly and violent" in New York, capital punishment constituted little more than an "act of vengeance."<sup>113</sup> Frustration with Cuomo's anti-death penalty stance contributed to the 1994 election of George Elmer Pataki, the state's first Republican governor in twenty years.<sup>114</sup> Pataki campaigned on a promise to expand the death penalty, something that no New York governor had done since 1977.<sup>115</sup> On March 7, 1995, he finally succeeded in reinstating the electric chair—three decades after the Temporary Commission had tried to eliminate it—with a new law creating ten separate instances where death was appropriate.<sup>116</sup>

Just as the political battle seemed over, the courts intervened. In 2004, New York's highest court invalidated Pataki's law on the grounds that it unconstitutionally pressured jurors into choosing the death penalty by warning them that offenders who did not get executed might be paroled.<sup>117</sup> Though Pataki moved quickly to amend the statute, he met stiff resistance in the State Assembly, now controlled by Democrats who were softening on the issue.<sup>118</sup> According to Democratic Assemblywoman Helene Weinstein, initially a supporter of capital punishment, "My vote 10 years ago was 10 years ago."<sup>119</sup> Since then, argued Weinstein, "new information, important information, about DNA testing" and "about innocent people being convicted" had emerged, changing her mind.<sup>120</sup> Though she did not mention the program by name, Weinstein's allusion to DNA testing referred to the Innocence Project, a program founded by law professors Barry Scheck and Peter Neufeld to show that a surprising number of death row inmates were innocent of their crimes.<sup>121</sup>

Battles over the death penalty in New York provide a glimpse into just how closely popular politics, statutory law, and judicial opinions operate to influence criminal law reform. Though support for the MPC remained high in the state, popular politics won out, influencing the state's treatment of first degree murder. To simply ignore this by

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112. Elizabeth Kolbert, *Assembly Backs Death Penalty by Wide Margin*, N.Y. TIMES, Mar. 7, 1989, at B2.

113. Elizabeth Kolbert, *Cuomo Vetoes Death Penalty Seventh Time*, N.Y. TIMES, Mar. 21, 1989, at B1.

114. Kevin Sack, *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1.

115. *Id.* at B11.

116. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at B5.

117. William Glaberson, *Across New York a Death Penalty Stuck in Limbo*, N.Y. TIMES, Aug. 21, 2004, at A1.

118. Patrick D. Healy, *Death Penalty Seems Unlikely to Be Revived*, N.Y. TIMES, Feb. 11, 2005, at B1.

119. *Id.* at B9.

120. *Id.* at B9.

121. See generally BARRY SCHECK & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

designating New York an MPC state risks occluding the failure of the Code to overcome local norms and legislative decree.

#### D. FELONY MURDER

Another area of the MPC roundly rejected by states, but also related to homicide, was the Code's elimination of felony murder. The MPC rejected the concept of felony murder, replacing it with homicide "committed recklessly under circumstances manifesting extreme indifference to the value of human life," a condition that was "presumed" if the actor was engaged in robbery, rape, arson, burglary, or kidnapping.<sup>122</sup> Most states refused to follow the MPC on this point, preserving the separate crime of felony murder.<sup>123</sup>

Some states even went so far as to preserve felony murder in cases where a nonviolent felony was at issue.<sup>124</sup> This was the case in Missouri—an MPC state—where literally any felony might trigger the state's felony murder provision. In 1926, a court found the illegal manufacture of whiskey to be a sufficient predicate for felony murder,<sup>125</sup> and in 1975 the Supreme Court of Missouri found stealing to be a sufficient predicate felony.<sup>126</sup> Also, Missouri considers felonies that actually cause the death of victims—and are therefore barred from being predicate felonies in other states due to what is known as the "merger doctrine"—legitimate triggers for felony murder.<sup>127</sup> An example occurred in 2001, when a defendant was successfully charged with felony murder for unlawfully using a firearm against a victim, the unlawful use of a firearm qualifying as the underlying felony.<sup>128</sup> The State Court of Appeals literally "abrogated" the merger doctrine, holding that in cases where defendants' "assaultive acts" resulted in death, those assaultive acts could themselves be considered predicate felonies.<sup>129</sup> Even though this led to an arguably "absurd result," namely the possibility that someone could be convicted of "both murder and the assault giving rise to the murder, as a separate felony," Missouri courts held fast to their new common law rule.<sup>130</sup>

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122. MODEL PENAL CODE § 210.2 (1985).

123. See, e.g., GENE P. SCHULTZ, CRIMINAL OFFENSES AND DEFENSES IN MISSOURI 166 (1986).

124. See, e.g., *State v. Chambers*, 524 S.W. 2d 826, 832 (Mo. 1975); *State v. Robinett*, 279 S.W. 696, 700-01 (Mo. 1926).

125. *Robinett*, 279 S.W. at 697, 700.

126. *Chambers*, 524 S.W. 2d at 832.

127. *State v. Gheen*, 41 S.W. 3d 598, 600, 604-05 (Mo. 2001).

128. *Id.*

129. ROBERT H. DIERKER, MISSOURI CRIMINAL LAW, MISSOURI PRACTICE SERIES 163-64 (2d ed. 2004).

130. *Id.*

### E. MODIFICATION OF THE NECESSITY DEFENSE

Almost as unpopular as the MPC's elimination of felony murder was its modification of the necessity defense.<sup>131</sup> At common law, necessity could be invoked in rare cases where a defendant committed a crime to prevent the occurrence of a greater harm that the defendant did not herself cause.<sup>132</sup> The MPC expanded this defense, allowing defendants to use it even if they had inadvertently caused the greater harm.<sup>133</sup> The MPC also allowed the defense to apply to a broad, relatively undefined number of "harm[s] or evil[s]," opening the door to myriad scenarios that most courts and legislatures would ultimately reject, including, for example, allowing for the theft of food in cases where a defendant's children were hungry.<sup>134</sup> Partly for these reasons, only two of the total thirty-four MPC states adopted its version.<sup>135</sup>

Sometimes states adopted the MPC but changed it, adding provisions that ultimately undermined its strength.<sup>136</sup> This was the case in Illinois, where the state legislature gradually added mental states to the MPC's purpose, knowledge, recklessness, negligence formula.<sup>137</sup> By 2007, it had added "having reason to know," "reasonably should know," "willfully," "maliciously," "fraudulently," and "designedly."<sup>138</sup> Though trivial, such modifications ultimately reflected a much larger trend, namely, a tendency on the part of state legislatures across the country to alter key provisions of the MPC once it had been adopted. As we have seen, this emerged in the context not simply of mental states, but of inchoate offenses, accomplice liability, statutory rape, felony murder, first degree murder, and necessity. In the next Part, we will see how even those aspects of the MPC faithfully preserved by state legislators were manipulated by courts.

## III. THE NEW COMMON LAW

While legislative modifications to the MPC are well known, less studied are efforts that courts have made to alter MPC definitions. Yet most states that adopted portions of the MPC have almost half a century

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131. Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 196 (2007).

132. DRESSLER, UNDERSTANDING, *supra* note 10, at 289.

133. MODEL PENAL CODE § 3.02 (1985); Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 3-4, 8-13, 17-20 (1985).

134. MODEL PENAL CODE § 3.02 (1985); see *People v. Fontes*, 89 P.3d 484, 486-87 (Colo. Ct. App. 2003); DRESSLER, CASES, *supra* note 4, at 565.

135. See Hoffheimer, *supra* note 131, at 196.

136. See, e.g., Robinson & Cahill, *supra* note 2, at 640 (describing legislative amendments to Illinois's criminal code that undermined MPC definitions).

137. *Id.* at 640-41; see also *infra* Part III.A.

138. Robinson & Cahill, *supra* note 2, at 640-41.

of case law interpreting MPC provisions. This new common law remains one of the least studied aspects of criminal law today, even though it impacts both the general and special parts of most state criminal codes.

#### A. MPC CULPABILITY PROVISIONS

One of the MPC's greatest contributions to criminal law is often considered to be the culpability provisions enumerated in its general part.<sup>139</sup> Prior to the drafting of the Code, states employed a variety of poorly defined terms to denote mental state, including malice, mens rea, willfulness, scienter and "general criminal intent."<sup>140</sup> To clarify what, precisely, such terms meant, the MPC divided mental state into four presumably straightforward categories: purpose, knowledge, recklessness, and negligence.<sup>141</sup> Whether a defendant possesses one particular mental state over another can have significant consequences. For example, if a defendant "unlawfully confines" a victim with the purpose of facilitating the commission of a felony, then that defendant could be charged with kidnapping, a "felony of the first degree,"<sup>142</sup> while if she simply restrains someone, the appropriate charge would be false imprisonment, a misdemeanor.<sup>143</sup>

Yet as precise as the MPC's delineations of mens rea are, state courts across the country have done much to muddy them, allowing jurors to impose culpability on defendants regardless of their actual thoughts. The primary vehicle for this has been a common law rule that a defendant's mental state can be imputed through the "natural and probable consequences" of her actions.<sup>144</sup> While Wechsler recognized that such a doctrine may be "the only way of proving intent" in some cases, he bridled at judicial overuse of the theory, particularly in cases where jurors were given a choice between possible mental states.<sup>145</sup> "Since a particular crime must actually be intended," warned Wechsler, "the charge must be precise and must not permit the jury to convict the actor on one of several mental states."<sup>146</sup> Yet this is precisely what courts across the country have done: reduce the MPC's narrow tailoring of

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139. MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 269 (2002); Holley, *supra* note 20, at 30; Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1980).

140. DRESSLER, *CASES*, *supra* note 4, at 161.

141. MODEL PENAL CODE § 2.02: GENERAL REQUIREMENTS OF CULPABILITY (1985).

142. MODEL PENAL CODE § 212.1: KIDNAPPING & § 212.2: FELONIOUS RESTRAINT (1985).

143. MODEL PENAL CODE § 212.3 (1985).

144. See, e.g., *People v. Coolidge*, 187 N.E.2d 694, 697 (Ill. 1963); *State v. Michaud*, 473 A.2d 399, 405 (Me. 1984) (recognizing natural and probable consequences doctrine); *Jennings v. State*, No. W2007-01087-CCA-R3-PC, 2009 Tenn. Crim. App. LEXIS 880, at \*11 (Oct. 21, 2009); *State v. Wheeler*, 414 N.W.2d 318, 1 (Wis. 1987).

145. See Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 576 (1961).

146. *Id.*

mental states to a loose menu of options that jurors can pick and choose from to get a conviction.<sup>147</sup>

New York provides an example. "After an all-night St. Patrick's Day Celebration," a former New York City Police officer shot and killed one of his colleagues.<sup>148</sup> Though the officer could not explain or even remember why he killed his victim, he was charged with intentional murder (second degree in New York), depraved heart murder (requiring the lower mental state of extreme recklessness), and, at the judge's request, "manslaughter in the first degree as a lesser included offense of intentional murder, and manslaughter in the second degree as a lesser included offense of depraved heart murder."<sup>149</sup> Just as Wechsler warned, jurors found themselves suddenly able to choose from a smorgasbord of mental states, undermining the MPC's imperative that a defendant's state of mind be matched with a single crime.<sup>150</sup>

Accomplice liability marks another area where courts have tended to veer away from the MPC's culpability provisions. While the MPC makes it clear that an accomplice needs the mental state of purpose, thereby rejecting the natural and probable consequences rule, courts in several states have gone the other way, allowing mental states to be imputed based on the natural and probable consequences of the accomplice's actions.<sup>151</sup> Even states that initially came out against applying the natural and probable consequences doctrine to accomplices have since developed new, judicially created parallel theories that accomplish the same end.<sup>152</sup> For example, just as Missouri courts declared that they would not impute mental state based on the natural and probable consequences of an accomplice's actions, so did new courts

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147. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 527 (1979) (Rehnquist, J., concurring) (declaring the constitutionality of permissive inference that persons intend natural and probable consequences of their actions); *United States v. Martin*, 772 F.2d 1442, 1445 (8th Cir. 1985) (affirming jury's conclusion that defendant made false statements to the government, even though the government official to whom he made the statements knew they were false); *United States v. Cotton*, 770 F.2d 940, 946 (11th Cir. 1985) (upholding jury instructions permitting but not requiring jurors to infer that a person intends the natural consequences of his actions); *United States v. Johnson*, 735 F.2d 373, 373 (9th Cir. 1984) (same); *People v. Gallagher*, 508 N.E.2d 909, 909 (N.Y. 1987) ("[W]here a defendant is charged with a single homicide, in an indictment containing one count of intentional murder and one count of depraved mind murder, both counts may be submitted to the jury, but only in the alternative.").

148. *Gallagher*, 508 N.E.2d. at 909.

149. *Id.* at 910.

150. Wechsler et al., *supra* note 145, at 576.

151. *People v. Houston*, 629 N.E.2d 774, 779 (Ill. App. Ct. 1994); *State v. Linscott*, 520 A.2d 1067, 1069 n.2 (Me. 1987); see also Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617 n.24 (1984) (describing how some courts allow jurors to impute mental states to aiders and abettors).

152. See, e.g., *State v. Anderson*, 953 S.W.2d 646, 647 (Mo. Ct. App. 1997); *State v. Mills*, 809 S.W.2d 1, 4 (Mo. Ct. App. 1990).



hold that a defendant is responsible for "those crimes which he could reasonably anticipate would be a part of that conduct."<sup>153</sup>

## B. MURDER

Other common law rules survived in so-called MPC states as well, dramatically altering many of the MPC's provisions. Again, murder in New York provides an example. At common law, defendants who intentionally killed their victims could assert a partial defense if they suffered from a heat of blood or passion or were "greatly provoked."<sup>154</sup> Classic common law examples of such provocation included mutual combat brought on by a "sudden quarrel," catching "another in the act of adultery with [one's] wife," and retaliation for having one's "nose pulled."<sup>155</sup> The defense could be claimed so long as the defendant did not have "sufficient cooling time for passion to subside and reason to interpose."<sup>156</sup>

To distinguish itself from the common law, the MPC rejected the language of sudden passion, opting instead for "extreme mental or emotional disturbance."<sup>157</sup> Pursuant to this language, the Code did not require "that the actor's emotional distress" come from "some injury, affront, or other provocative act perpetrated upon him by the deceased."<sup>158</sup> Instead, it did away with "a host of more or less hard and fast common law rules defining the scope of the provocation defense."<sup>159</sup> As it did away with such rules, however, the MPC also failed to provide clear guidance on what, precisely, constituted extreme emotional disturbance. This left a considerable amount of interpretation, if not outright law creation, up to New York courts.

In 1976, the New York Court of Appeals decided *People v. Patterson*, an early case involving the extreme emotional disturbance defense, noting that "[t]he opportunity opened for mitigation differs significantly from the traditional heat of passion defense."<sup>160</sup> Citing the MPC *Commentaries*, the court asserted that the new emotional disturbance language did not limit the defense to instances where "a defendant, provoked, acts 'under the influence of some sudden and uncontrollable emotion.'"<sup>161</sup> To elaborate, the court abandoned the old requirement that no cooling time could pass between the provocation and the act, holding instead that precisely because "a significant mental

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153. *Mills*, 809 S.W.2d at 3-4; see also *Anderson*, 953 S.W.2d at 647.

154. BLACKSTONE, *supra* note 22, at 207, 214.

155. *Id.* at 214.

156. *Id.*

157. MODEL PENAL CODE § 210.3 (1985).

158. *Id.* § 210.3 cmt. 5 at 61.

159. DUBBER, *supra* note 139, at 269.

160. 347 N.E.2d 898, 907 (N.Y. 1976).

161. *Id.* at 906.

trauma” might have influenced the defendant’s thought processes “for a substantial period of time,” any length of time could pass and the defendant could still claim the defense.<sup>162</sup>

Precisely because New York’s Penal Code made no mention of cooling time, *Patterson* quickly became legal doctrine in the Empire State. Four years later, the New York Court of Appeals again dealt with an emotional disturbance case, citing *Patterson* as evidence of the “distinction between the past and present law of mitigation.”<sup>163</sup> The court in *People v. Casassa* asserted that in *Patterson*, an act arising from extreme emotional disturbance did not have to be “spontaneously undertaken.”<sup>164</sup> On the contrary, “it may be that a significant mental trauma has affected a defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.”<sup>165</sup>

Even as *Casassa* cited *Patterson* for the new common law rule that cooling time did not apply, so too did *Casassa* develop a rule of its own, namely that the emotional disturbance in question had to have an objectively reasonable explanation.<sup>166</sup> This holding settled an ambiguity in the statutory language of the MPC, which provided a mitigating defense so long as the “defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.”<sup>167</sup> Though the statute’s call to focus on circumstances “as the defendant believed them to be” could be read as a subjective standard, the court found an equally plausible, objective reading. “Whether the language of this statute requires a completely subjective evaluation of reasonableness,” mused Judge Jasen, “is a question that has never been decided by this court.”<sup>168</sup> Conceding that the MPC hoped to do away with “the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough,” the court held firm to the view that “[t]he ultimate test, however, is objective.”<sup>169</sup>

Over the course of the next two decades, the New York Court of Appeals assembled a collection of cases illustrating precisely how and when the defense of extreme emotional disturbance might apply—all

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162. *Id.* at 908.

163. *People v. Casassa*, 404 N.E.2d 1310, 1314–15 (N.Y. 1980).

164. *Id.*

165. *Id.* at 1314.

166. *Id.* at 1316.

167. N.Y. PENAL LAW § 125.25 (2011).

168. *Casassa*, 404 N.E.2d at 1316.

169. *Id.*

arguably necessary reading for students interested in comprehending the doctrine. To take just a few examples, the court held that an instruction was not warranted in a case where a victim put his hand on a defendant's plate of food,<sup>170</sup> but was warranted when a victim mocked a defendant's inability to get an erection, overturning the traditional rule that words alone could not constitute provocation.<sup>171</sup> Indeed, judicial interpretations of what did and did not constitute sufficient provocation provided something of a crystal ball into community norms in New York, distinguishing actions that impugned cultural artifices like masculinity from mere annoyances.

Though criminal law casebooks often cite classic common law examples of provocation—mutual combat, catching spouses in bed with others, and so on—none discuss the manner in which courts have created new categories of voluntary manslaughter that coincide with the MPC. Nor, for that matter, do casebooks explain how courts in MPC states have actually resurrected older categories that undermine the Code.<sup>172</sup> For example, even though the Arkansas legislature adopted the MPC's "extreme emotional disturbance" language, Arkansas courts quickly took the doctrine in a very different direction from the Empire State, returning it to its pre-MPC guise.<sup>173</sup> Rather than follow New York's abandonment of old, common law terms like provocation, Arkansas judges re-inserted provocation into its new defense.<sup>174</sup> "We have held repeatedly," noted the Arkansas Supreme Court in 2005, "that, in order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as 'physical fighting, a threat, or a brandished weapon.'"<sup>175</sup>

Further, Arkansas adopted the long-standing rule that the killing had to occur before a significant cooling time could pass, a point rejected by the MPC.<sup>176</sup> Even though Arkansas continued to use the term "extreme emotional disturbance," state courts had effectively resurrected the old common law provocation defense. This, ironically, was the new common law rediscovering old forms.

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170. *People v. Walker*, 475 N.E.2d 445, 445–46 (N.Y. 1984).

171. *People v. Moye*, 489 N.E.2d 736, 738–39 (N.Y. 1985).

172. See, e.g., DUBBER & KELMAN, *supra* note 4, at 174 ("While the judiciary today retains a 'common law' power of adjudication that discretion is limited to the interpretation of legislatures' criminal codes (and criminal statutes strewn throughout other codes).").

173. ARK. CODE ANN. § 5-10-104(a)(1)(A) (2006).

174. *Boyle v. State*, 214 S.W.3d 250, 253 (Ark. 2005) (quoting *Kail v. State*, 14 S.W.3d 878, 881 (Ark. 2002)).

175. *Id.*

176. *Kail v. State*, 14 S.W.3d 878, 880–81 (Ark. 2002).

### C. RAPE

Other examples of judicial law creation emerged in Pennsylvania. After joining the MPC in eliminating the language of consent from its rape statute, for example, Pennsylvania reduced rape to instances where defendants engaged in sexual intercourse “by forcible compulsion.”<sup>177</sup> State courts then proceeded to enumerate a variety of circumstances not anticipated by the MPC in which forcible compulsion might apply. To take just a few examples, Pennsylvania courts found forcible compulsion when a defendant who enjoyed his victim’s trust and confidence employed emotional exploitation<sup>178</sup> and when a father employed psychological coercion by engaging in sexual intercourse with his daughter after showing her sexually explicit photographs.<sup>179</sup> Neither case involved either the use or threat of force, indicating that courts were pushing the law of rape in new directions, away from MPC and common law rules rooted in resistance and towards standards more sensitive to disparate power relations. Along these lines, Pennsylvania courts also found forcible compulsion when a therapist abused his authority over a patient<sup>180</sup> and an uncle abused his authority over his niece.<sup>181</sup>

Even as Pennsylvania courts augmented the force rule, other states developed judicial innovations in the law of rape as well. In Missouri, a court relaxed the force requirement for rape where the defendant was a counselor who used his position of authority over the victim, threatening to ruin her chances of obtaining a job if she did not comply with his sexual requests.<sup>182</sup> Applying a “totality of the circumstances test,” the court cited prior case law focusing less on whether the victim resisted physically and more on “the atmosphere and setting of the incident,” including whether the defendant exercised “domination and control of the victim.”<sup>183</sup> Citing even more nonstatutory, new common law, the court continued that even threats that had nothing to do with physical violence, such as a threat to remove custody of children, could be taken into account in a rape allegation.<sup>184</sup> All of the above point to the manner in which statutory law, including law modeled after the MPC, can evolve through judicial interpretation, sometimes resulting in significant modifications of code provisions.

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177. 18 PA. CONS. STAT. ANN. § 3121 (West Supp. 2011).

178. *Commonwealth v. Ables*, 590 A.2d 334, 338 (Pa. 1991).

179. *Commonwealth v. Ruppert*, 579 A.2d 966, 969 (Pa. 1990).

180. *Commonwealth v. Frank*, 577 A.2d 609, 619 (Pa. 1990).

181. *Commonwealth v. Dorman*, 547 A.2d 757 (1988).

182. *State v. Spencer*, 50 S.W.3d 869 (Mo. Ct. App. 2001).

183. *Id.* at 873 (citing *State v. Kilmartin*, 904 S.W.2d 370, 374 (Mo. Ct. App. 1995)).

184. *Id.* at 875 (citing *State v. Dee*, 752 S.W.2d 942, 946 (Mo. Ct. App. 1988)).

#### D. ACCOMPLICE LIABILITY

Just as Missouri and Pennsylvania courts altered the MPC's law of rape, other states altered the MPC's approach to accomplice liability. Across the river from Missouri, for example, Illinois courts retained the merger doctrine but revised the MPC's accomplice liability language.<sup>185</sup> While the MPC made it clear that the natural and probable consequences of one party's actions could not be used to implicate others, Illinois courts found an alternate rule that achieved a similar end.<sup>186</sup> Rather than natural and probable consequences, Illinois judges turned to a judicially constructed doctrine known as the "common design rule" that held "where two or more persons engage in a common criminal design," then "any acts in furtherance thereof committed by one party are considered to be the acts of all parties to the common design."<sup>187</sup> Though reminiscent of the MPC's conspiracy language, the doctrine actually lent itself to a dramatic reformulation of accomplice liability, particularly because "the State need only prove the accused had the specific intent to promote or facilitate a crime."<sup>188</sup> For example, in *People v. Taylor*, the defendant agreed to participate in a robbery only to discover that one of his accomplices secretly intended to shoot the victim.<sup>189</sup> While under the MPC the defendant would not have been held responsible for a crime he did not anticipate, the Illinois appellate court held explicitly that it was not necessary for the prosecution "to prove the accused had the specific intent to promote or facilitate the crime with which he is charged."<sup>190</sup> Instead, all the State had to show was that the accomplices had agreed to commit "a crime," meaning any crime that might be framed as part of a common plan.<sup>191</sup>

While Illinois adopted the common design rule, Maine courts modified the MPC in another way, by resurrecting natural and probable consequences as a way of establishing accomplice liability.<sup>192</sup> The Supreme Judicial Court of Maine sanctioned this approach in *State v. Linscott*, a 1987 case involving the conviction of an accomplice who claimed to lack the requisite mental state for murder.<sup>193</sup> According to the defendant, he joined three other men in what he believed was going to be the robbery of a local cocaine dealer, only to learn that one of his accomplices secretly planned to murder the victim.<sup>194</sup> Though the court

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185. *People v. Houston*, 629 N.E.2d 774, 779 (Ill. App. Ct. 1994).

186. *Id.*

187. *Id.*

188. *Id.*

189. 557 N.E.2d 917, 921 (Ill. 1990).

190. *Id.*

191. *Id.*

192. *State v. Linscott*, 520 A.2d 1067, 1070 (Me. 1987).

193. *Id.* at 1068.

194. *Id.*

believed defendant lacked the requisite intent for murder, it nevertheless invoked the doctrine of “foreseeable consequence[s],” holding that mental state could be imputed based on the natural and probable consequences of defendant’s actions, and a probable consequence of an armed robbery was murder.<sup>195</sup> While the MPC expressly rejected such an approach, and Maine otherwise adopted much of the MPC, this particular provision marked a departure from the code by state courts.

Missouri courts performed a similar revision on the MPC’s definition of conspiracy. While the Missouri legislature adopted the MPC requirement that overt acts be required to establish all but the most serious of conspiracies, Missouri courts quickly loosened this requirement to include the absence of action. For example, in a 1984 case *State v. Mace*, the Missouri Court of Appeals for the Eastern District held that while proof must be adduced that an overt act occurred, there was actually “no requirement” that such an act be “physical.”<sup>196</sup> Indeed, the court even went so far as to hold that mere silence counted as an overt act, rendering the rule nearly meaningless.<sup>197</sup>

Missouri courts performed a similar revision on the MPC’s definition of knowledge. While the Code limited knowledge to instances where a defendant is “practically certain” that his conduct will produce a certain result, the appellate court for the Western District of Missouri expanded this definition in *State v. Johnston* to include a defendant who shot his best friend after pointing and firing what he believed to be an empty handgun at him.<sup>198</sup> Prior to the killing, the defendant welcomed the victim to his home, “talked, joked, and laughed” with him, and then accepted the victim’s offer to inspect a handgun that the victim had concealed under his shirt.<sup>199</sup> The defendant emptied several rounds from the gun’s chamber and, believing the gun to be empty, pointed it in jest at his friend and pulled the trigger three times, killing him on the third.<sup>200</sup> Though the defendant’s conduct indicated that he did not actually know the gun was loaded, and therefore was negligent, the Missouri court presumed that the defendant and the victim were engaged in a game of “chicken” and that the defendant therefore knew he would kill his friend when he pulled the trigger.<sup>201</sup> However, even if the defendant had been engaged in a game of chicken, this does not necessarily mean that he knew he was going to kill his friend. At best, he knew there was a substantial risk that he might kill his friend, rendering his mental state one of recklessness. After all, while the MPC provides for a finding of

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195. *Id.* at 1070.

196. 682 S.W.2d 163, 166 (Mo. Ct. App. 1984).

197. *Id.*

198. 868 S.W.2d 226, 227 (Mo. Ct. App. 1994).

199. *Id.*

200. *Id.*

201. *Id.* at 228.

knowledge where a defendant “is aware of a high probability” that something exists,<sup>202</sup> this expansion is obviated in cases where a defendant “actually believes that it does not exist,” as the defendant in *Johnston* likely did when firing a gun at his best friend. Perhaps eager to deter citizens of Missouri from engaging in similar games in the future, the appellate court sanctioned a substantial departure from the MPC’s definition of knowledge, allowing the jury to find knowledge in cases where defendants at best were aware of a risk.<sup>203</sup>

In a manner that only highlights the extent to which courts employed “new” common law rules to transform the MPC, Missouri courts took a very different—but arguably equally heretical—tack in cases that involved defendants who implausibly maintained that they were not aware of the age of certain minors who joined them in criminal activity.<sup>204</sup> For example, in *State v. Hopkins*, a Missouri appellate court ignored the MPC’s definition of knowledge and concluded that a defendant who purchased alcohol for a twelve-year-old and proceeded to drink alcohol with that twelve-year-old in his car was not guilty of second degree child endangerment.<sup>205</sup> Though the MPC’s definition of knowledge—which the Missouri legislature adopted—clearly allowed for a conviction in such a case where a defendant was at the very least “aware of a high probability” that a certain attendant circumstance was true, the Court of Appeals for the Eastern District of Missouri held that the State had to prove that the defendant actually knew the victim was under seventeen.<sup>206</sup> In arriving at this holding, the Eastern District relied on an earlier case that also let a defendant go free for not checking the age of a minor.<sup>207</sup> In that case, *State v. Nations*, the defendant hired a sixteen-year-old to dance at a nightclub without checking her age.<sup>208</sup> Though convicted at the trial level for “knowingly” endangering the welfare of a child “less than seventeen years old,” the appellate court reversed,<sup>209</sup> marking a dramatic departure from the Western District’s holding in the “game of chicken” case that the defendant knew he had shot his best friend even though he had emptied several rounds from the chamber. Obviously, both the shooter and the endangerer knew there was some probability their conduct might lead to a criminal result, yet the new common law treated the two types of defendants differently. Why? Perhaps Missouri courts wanted to send a stronger signal to those

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202. MODEL PENAL CODE § 2.02(7) (1985).

203. *Johnston*, 868 S.W.2d at 228.

204. See, e.g., *State v. Hopkins*, 873 S.W.2d 911, 912 (Mo. Ct. App. 1994); *State v. Nations*, 676 S.W.2d 282, 285–86 (Mo. Ct. App. 1984).

205. 873 S.W.2d at 911–12.

206. *Id.* at 912.

207. *Id.*

208. 676 S.W.2d at 283, 285–86.

209. *Id.* at 286.

who toyed with lethal weapons than those who drank alcohol with children. Or perhaps Missouri courts wanted to signal to parents that they, and not the law, were ultimately responsible for supervising their progeny. Regardless of the precise reason, Missouri's new common law dramatically complicated the MPC's otherwise straightforward definition of knowledge.

Far from being an outlier, Missouri proved representative of nearly all thirty-four states that adopted the MPC.<sup>210</sup> In each of these states, courts stepped in after the Code was adopted and altered key provisions.<sup>211</sup> Such alterations—or what this Article calls new common law—are largely ignored in the literature but, as we shall see in the next Part, theoretically significant.

#### IV. THEORETICAL IMPLICATIONS

Criminal law scholars tend to downplay the significance of cases to understanding criminal law.<sup>212</sup> Such animosity is nothing new, and in fact dates back to a surge of frustration with the common law that peaked in the 1930s.<sup>213</sup> At the forefront of such critiques were legal realist scholars like Karl Llewellyn who believed that law should reflect social realities—not ancient doctrines—and should rely on empirical studies in social science for guidance.<sup>214</sup> Though Llewellyn concentrated his reform efforts on rationalizing commercial law, his general animosity towards the common law was shared by scholars in the criminal law realm as well, including Wechsler.<sup>215</sup> To Wechsler's mind, the common law actually contributed to a narrow judicial mindset that threatened Roosevelt's early, ambitious New Deal programs.<sup>216</sup>

When Wechsler and Michael wrote their criminal law casebook, they deliberately reduced the number of cases in their book, substituting in their place extensive notes that drew from law review articles,

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210. See, e.g., sources cited *supra* note 81.

211. See, e.g., sources cited *supra* note 81.

212. Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257, 257 (2009); Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 263–64 (2009); Douglas Husak, *Criminal Law Textbooks and Human Betterment*, 7 OHIO ST. J. CRIM. L. 267, 270 (2009); Lloyd L. Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 279, 282 (2009); Robert Weisberg, *Did Legal Realism Engage the Real World of Criminal Law?*, 7 OHIO ST. J. CRIM. L. 293, 298–99 (2009).

213. Walker, *Anti-Case Method*, *supra* note 61, at 238–39.

214. Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 327 (1995). For a study of one scholar who influenced legal realism, see Monica Eppinger, *Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography*, in *LIVING LAW: RECONSIDERING EUGEN EHRLICH* 21–22 (Marc Hertogh ed., 2009).

215. Walker, *Anti-Case Method*, *supra* note 61, at 218.

216. *Id.*



philosophical treatises, and social science studies.<sup>217</sup> To Wechsler's mind, such an approach helped to produce a new kind of student, one liberated from the "closed-system" approach of the common law, and eager to think critically about the manner in which social science could contribute to radical legal reform.<sup>218</sup>

Wechsler received an invitation from the ALI to serve as the MPC's Reporter in part because of the success of his casebook, as the Code was to draw heavily from advances in social science to reform ancient common law doctrines.<sup>219</sup> Wechsler and Michael had already sought ways to improve such doctrines, particularly in the law of homicide, hoping to rationalize redundancies, tailor sentencing, and clarify confusing common law rules.<sup>220</sup> Over the course of the next decade, from 1952 to 1962, the ALI relied on a series of experts to reform almost every area of criminal law, substituting the common law's traditional emphasis on retribution and community conscience with a more scientific emphasis on treatment and the reduction of criminal harm.<sup>221</sup> Though Wechsler himself retained an interest in the utility of desert,<sup>222</sup> many of the Code's new provisions reflected a very different approach, located far from local community sentiment, usages, and customs.<sup>223</sup>

Though at first glance similar to Llewellyn's Uniform Commercial Code (UCC), the MPC's rejection of local custom made it and the UCC profoundly different. Despite his interest in modernism, for example, Llewellyn kept local custom at the center of his mind, staying true to the realist maxim that legal reform should draw inspiration not from abstract principles but from "the trials of experience."<sup>224</sup> Though just as opposed to the common law as Wechsler, in other words, Llewellyn retained an appreciation for the fact that judge-made law also included within it significant "folk artifacts," and useful "working rules" that had "proven their worth over time."<sup>225</sup> This led him to articulate a distinction between the "grand" or valuable portions of the common law, from the less valuable "formal" aspects.<sup>226</sup> To Llewellyn's mind, it was the legislator's job to "take the good, practical folkways" of the common law, meanwhile rejecting its "outmoded" facets.<sup>227</sup>

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217. See *id.* at 219.

218. *Id.*; see also *supra* Part I.C.

219. Walker, *Anti-Case Method*, *supra* note 61, at 237.

220. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 702, 706 n.19 (1937).

221. DUBBER, *supra* note 79, at 7-11.

222. See *infra* notes 257-60 and accompanying text.

223. See generally Walker, *American Oresteia*, *supra* note 94.

224. Kamp, *supra* note 214, at 332.

225. *Id.* at 335.

226. *Id.*

227. *Id.* at 335-36.

Central to Llewellyn's belief in the value of folkways was the discipline of anthropology, a field that inspired one of his best known works, *The Cheyenne Way*.<sup>228</sup> In that book, Llewellyn extolled those aspects of tribal behavior that reflected sensible practices developed from the ground up, arguing that written law worked best when it tracked local custom.<sup>229</sup> To Llewellyn's mind, the business community reflected another type of tribe, like the Cheyenne, that had established its own customs governing commercial transactions, an insight that guided his preparation of the UCC.<sup>230</sup>

By contrast, the drafters of the MPC downplayed the significance of folkways in criminal law reform.<sup>231</sup> Rather than presume that criminal law should be "what judges do"—a Realist maxim—the ALI drafters spent considerable amounts of time focused on what judges had done wrong, and what real, expert-driven reform should look like.<sup>232</sup> Though Wechsler kept custom in mind, the inspiration for much of the MPC lay not in local practice but behavioral science: psychological and sociological work done on treatment-oriented goals such as rehabilitation and deterrence.<sup>233</sup>

The MPC's break from the common law sparked a sea-change in criminal law pedagogy as scholars moved to present the MPC not as an evolved form of the common law, or even a repository for the best of common law rules, but a rational, ultimately superior alternative.<sup>234</sup> Not long after the MPC was completed, for example, a new generation of criminal law scholars led by Kadish began drafting casebooks heavily influenced by Wechsler and Michael, even to the point that they included the MPC at the end of their books as an example of a rational code that could be compared to archaic common law.<sup>235</sup> Once states began to adopt portions of the MPC, criminal law scholars then began to divide the country into two kinds of states: those that adopted the MPC, and the rest.<sup>236</sup> Underlying this practice was, of course, a larger set of normative, even political, assumptions about the nature of criminal law generally. To

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228. *Id.*

229. See generally K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

230. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622–27 (1975); Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201 (1991). In thinking about codifying commercial law, Llewellyn drew inspiration from turn-of-the-century anthropologist William Graham Sumner, who posited that "folkways," or local practices, were always more powerful than "law ways," or written rules. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 261 (1940).

231. Walker, *American Oresteia*, *supra* note 94, at 1017.

232. Kamp, *supra* note 214, at 355; see also DUBBER, *supra* note 79, at 7–11; LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960*, at 1–44 (1986).

233. DUBBER, *supra* note 79, at 7–11.

234. See Kadish, *supra* note 75, at 521.

235. MONRAD PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* x–xi (1962).

236. MONRAD PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES* (2d ed. 1965).

the younger, reform-minded generation, MPC states were in fact more progressive, more scientific, and less likely to cave to popular demands for retribution and revenge.<sup>237</sup> Such states inspired the hope that a rational criminal code could be implemented across the country, one that ignored irrational calls for increased punishment, execution, and redundant offenses.<sup>238</sup>

Yet between innovations in behavioral science and legal change rested an entire strata of thought far removed from the realm of rational inquiry, a realm that Lawrence Friedman has since called "popular legal culture"<sup>239</sup> inhabited by "popular ideas, attitudes, values, and opinions"<sup>240</sup> regarding what the law is. To their own detriment, devotees of the MPC did not consider the importance of popular legal culture to be central.<sup>241</sup> One of the best examples of this was the failure of MPC proponents Kadish and Herbert Packer to reform California's penal code.<sup>242</sup> Asked by California's Joint Legislative Committee to improve criminal law in the Golden State, Kadish and Packer spent several years on the drafting of a new criminal code, importing many of the innovations recommended by the MPC.<sup>243</sup> Though many such reforms would likely have passed legislative muster, Kadish and Packer endorsed several changes that flew in the face of customary criminal law in California, including the decriminalization of certain sexual behaviors, the expansion of the insanity defense, and the liberalization of marijuana laws.<sup>244</sup> When members of California's Advisory Board read the Committee's recommendation that possession and sale of less than one pound of marijuana be considered a misdemeanor, for example, they reacted "with such emotional indignation that all avenues for a thoughtful interchange of points of view were quickly closed."<sup>245</sup> Not long thereafter, "the acting project director was informed by telephone that the chairman of the Joint Legislative Committee had discharged all of the members of the staff and ordered the project halted at once."<sup>246</sup> Though Kadish and Packer wrote a letter protesting the decision, no new Committee was

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237. See generally Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000).

238. *Id.*

239. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L. J. 1579, 1597 (1989).

240. Lawrence M. Friedman, *Total Justice: Law, Culture, and Society*, 40 BULL. AM. ACAD. ARTS & SCI. 24, 28 (1986).

241. *Id.* at 29.

242. See Arthur H. Sherry, *Criminal Law Revision in California*, 4 U. MICH. J.L. REFORM 429, 434-35 (1971); Interview with Sanford H. Kadish in Berkeley, Cal. (May 19, 2008) (on file with Author).

243. Sherry, *supra* note 242, at 434-37; Interview with Kadish, *supra* note 242.

244. Sherry, *supra* note 242, at 434-49.

245. *Id.* at 439-40.

246. *Id.* at 441.

appointed and California's criminal code remained largely unchanged for the remainder of the twentieth century.<sup>247</sup>

Though Kadish later blamed "conservatives" for killing criminal law reform in California, he did little to make sure that the Committee's suggestions were in line with what most voters believed, even confessing that the academic members of the staff ran the Committee meetings as "post-graduate seminars."<sup>248</sup> Had Kadish and his colleagues approached such seminars in a more anthropological way, focusing on the local norms of California voters, they might have been able to develop strategic concessions—much like Wechsler did in New York—saving reform.<sup>249</sup>

Kadish's failure in California underscores the importance of conveying the link between culture and criminal law to students. Though liberalizing marijuana laws may have appeared uncontroversial at the time, code reformers failed to accurately assess the power of conservative politics in California in the 1960s, undoubtedly substituting liberal positions on marijuana use common in Berkeley and Palo Alto for more conservative positions in rural, working-class demographics across the state.<sup>250</sup> Further, code reformers may have fared better had they remained more closely attuned to trends in state politics, particularly a pronounced shift towards conservatism mid-decade, as voters recoiled at urban rioting, antiwar protest, and Berkeley's filthy free-speech movement.<sup>251</sup>

While criminal law courses can probably never incorporate the full scope of state and local politics into their syllabi, methods of emphasizing the link between criminal law and culture nevertheless remain.<sup>252</sup> For example, one way to convey the link between law and culture is to delve into the particulars of state law, showing how certain states adopted portions of the MPC but rejected others.<sup>253</sup> Another is to look at courts, focusing on how judicial opinions modified those sections of the MPC that were adopted. True to its anthropological bent, the drafters of the UCC did just this, setting apart a special organ for publishing judicial

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247. Letter from Sanford H. Kadish, Professor of Law, Univ. of Cal., Berkeley & Herbert L. Packer, Professor of Law, Stanford Univ., to Senator Donald L. Grunsky (Sept. 24, 1969), in *Letters*, 22 STAN. L. REV. 160, 161–63 (1969).

248. Interview with Kadish, *supra* note 242.

249. Walker, *American Oresteia*, *supra* note 94, at 1041–51.

250. See generally JAMES T. CAREY, *THE COLLEGE DRUG SCENE* (1968) (exploring the meaning and significance of drug use by college age youth around Berkeley in the 1960s); JAY STEVENS, *STORMING HEAVEN: LSD AND THE AMERICAN DREAM* (1988).

251. See GODFREY HODGSON, *AMERICA IN OUR TIME* 288–305 (1978); J. ANTHONY LUKAS, *DON'T SHOOT—WE ARE YOUR CHILDREN!* 447–61 (1971) (compiling ten biographies about the generation that came of age in the middle and late sixties).

252. Chad Flanders, *The One-State Solution to Teaching Criminal Law or Leaving the Common Law and the MPC Behind*, 8 OHIO ST. J. CRIM. L. 167, 168 (2010).

253. *Id.*

modifications of the MPC.<sup>254</sup> However, nothing similar exists for the MPC, leaving most students blind to the manner in which it has interacted with local cultures. This has led to a problem that anthropologist Clifford Geertz identified with top-down, philosophical approaches to studying society generally, namely the problem with extracting “the general from the particular” and then setting the particular “aside as detail, illustration, background, or qualification.”<sup>255</sup> To Geertz, such moves yield a relatively narrow understanding of “the very difference we need to explore.”<sup>256</sup>

Geertz’s attention to local difference warrants closer thought by criminal law scholars and teachers. This is because students suffer at least two distinct harms when they are not provided with a clear view of how local culture impacts criminal law, including the MPC. First, failing to instruct students on judicial modifications of the MPC, or what this Article calls the new common law, renders students less prone to understanding what, precisely, the law forbids, a problem that scholars such as Robinson have argued is a serious concern.<sup>257</sup> Second, failing to instruct students on the new common law prevents them from seeing the critical role that criminal law-making can play in quieting community outrage, a phenomenon that criminal law scholars call the utility of desert.<sup>258</sup> Though scholars revile redundant criminal provisions, for example, such provisions are often important responses to particular moments of community outrage.<sup>259</sup> As scholars Paul Robinson and Michael Cahill note, for example, “If there is a series of drive-by shootings, or a particularly scary home invasion case, or some carjackings, a common response is to create special offenses for each of these particular kinds of conduct, even though they are already fully criminalized and, where possible, prosecuted.”<sup>260</sup> While both Robinson and Cahill find such behavior reprehensible, even they agree that the public is affected by such moves, arguably precluding average voters from doing even more serious damage.<sup>261</sup>

What, skeptics might ask, might voters do? Citizens deprived of immediate responses to gruesome crimes may retaliate by electing tough-

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254. Frier, *supra* note 230, at 2203.

255. CLIFFORD GEERTZ, *AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST* 40 (1995).

256. *Id.*

257. Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 731 (1990).

258. Kent Greenawalt, *Commentary, Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 358–59 (1983). See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

259. See generally Robinson & Darley, *supra* note 258.

260. Paul H. Robinson & Michael T. Cahill, *Can A Model Penal Code Second Save the States from Themselves*, 1 OHIO ST. J. CRIM. L. 169, 171 (2003).

261. *Id.* at 170–71.

on-crime representatives who end up imposing harsher penalties on all offenders.<sup>262</sup> Outraged citizens may also refuse to channel public funds into the defense of the accused, a serious problem for public defenders across the United States.<sup>263</sup> Though downplayed by criminal law scholars, in other words, the problem of voter outrage might actually be one of the most serious yet underestimated forces acting on America's criminal justice system even today.

### CONCLUSION

Though criminal law scholars continue to divide American jurisdictions into MPC and common law states, it is not clear that such divisions retain any real pedagogical value. As this Article has shown, no state in the Union continues to follow the ancient common law of England, nor does any state exist without a criminal code. Indeed, out of the fourteen states that did not adopt the MPC—a move that has since relegated them into the common law category—none adhere to anything that might remotely be called English common law.

As we have seen, all common law states have long since codified their criminal law, reserving the enforcement of ancient common law crimes to “reception statutes.”<sup>264</sup> Yet the use of such statutes is exceedingly rare, confined to idiosyncratic, nineteenth-century-era offenses like “being a common scold,” and “burning a body in a cellar furnace.”<sup>265</sup> Archaic at best, these types of offenses hardly warrant the sustained attention of first-year law students.

Even the argument that certain states codified common law terms is hardly a justification for continuing the common law divide. As this Article illustrates, most states have legislatively altered what might once have been considered common law offenses, creating an entirely new form of American criminal law. The impact of uniquely American cultural influences on this criminal law is perhaps one of the greatest reasons for ending the mythology of the common law state. Further, understanding the manner in which such local cultures impact criminal

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262. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 22 (2007).

263. See, e.g., Editorial, *Limping Along*, ST. LOUIS POST-DISPATCH, Feb. 16, 2007, at C10; Editorial, *Rights on the Verge of Collapse*, ST. LOUIS POST-DISPATCH, Mar. 19, 2006, at B2. Redundant codes may also provide opportunities to do justice. For example, prosecutors in Missouri have the opportunity to charge defendants suspected of attempted killing with one of two crimes, either attempted murder or first degree assault. See MO. REV. STAT. §§ 565.020–565.024, 565.050 (2010). Here, an attempted murder charge actually brings with it a lower penalty, meaning that prosecutors could satisfy community outrage by mentioning murder, meanwhile reducing the penalty to sympathetic defendants by charging attempted murder. See *id.*

264. LAFAYE, PRINCIPLES, *supra* note 10, at 66.

265. *Id.* at 67.

law is considerably more important to students than regurgitations of lost common law doctrines.

Just as the notion of the common law state has been increasingly anachronistic, so too has the conceit of the MPC jurisdiction. Though thirty-six states adopted portions of the MPC, no state adopted all of it. Further, even those states that adopted significant sections of the Code still retained key aspects of their old law, particularly those that reflected local values. Arbiters of such values proved to be both legislative drafters and courts, the latter employing the power of judicial interpretation to align MPC provisions with local law.

Secreted over almost a fifty-year period from 1962 to 2010, judicial modifications of MPC rules embody nothing less than a new common law. That casebooks and treatises do not focus on this law is mystifying. However, even the most pro-MPC criminal law theorists have begun to doubt the continued relevance of the Code. According to criminal law scholar Markus Dubber, an ALI enthusiast, the MPC “belongs to a bygone era of American penal law.”<sup>266</sup> Built on the twin theories of deterrence and treatment, Dubber continues, the Code “no longer enjoys the broad consensus it might have in the 1950s.”<sup>267</sup>

Indeed it does not. Though criminal law casebooks continue to present the MPC as an innovative, recent reform, it is rapidly approaching its fiftieth birthday. At its inception half a century ago, it dovetailed nicely with prevailing trends towards modernism in law—a Benthamite moment during which rationality and science eclipsed history and anthropology.<sup>268</sup> However, the devolution of the MPC in the latter half of the twentieth century suggests that history and culture may be regaining lost ground.<sup>269</sup> Indeed, the very criticisms of state codes advanced by scholars—that they are incoherent, sedimentary, even redundant—only confirm the Burkean critique of Bentham, namely that law itself cannot be understood by logical principles and scientific rules but requires a close study of the history and culture of a particular society.<sup>270</sup>

Judicial opinions and state statutes provide just such a study. Though Dubber has declared that “[t]he age of the common penal law is over,” and that “[p]enal law is now made in codes by legislators, not in court opinions by judges,”<sup>271</sup> even a cursory look at the manner in which

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266. Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 54 (2000).

267. *Id.* at 53.

268. DUBBER, *supra* note 79, at 7–11.

269. See Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456–57 (1988).

270. *Id.* at 450.

271. Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 50 (1999).

courts have modified MPC provisions, or what this Article calls the “new common law,” suggests this is incorrect. In fact, criminal law may be enjoying a renaissance of new common law principles. While the midpoint of the twentieth century witnessed a spike in modernist thought, of which the MPC was a product, the twenty-first century looks to be a much different era, marked by a return to “historical and prescriptive modes of thought.”<sup>272</sup> Perhaps the biggest example of this is the recent surge of interest in empirical legal studies, an anti-philosophical inquiry bent on understanding the law as it is, not as it might or even should be.<sup>273</sup>

Some of the MPC’s most fervent supporters understood this. As much as Wechsler resisted the common law, for example, he never lost sight of local community norms and local, cultural values. While serving on New York’s Temporary Commission to revise its Penal Law in 1963, Wechsler consistently prodded the Commission to consider local attitudes.<sup>274</sup> Wechsler’s concern that criminal law coincide with community values is often lost in criminal law courses, particularly as teachers struggle to maintain the false dichotomy between common law and MPC states. Setting aside this dichotomy is vital if criminal law scholars want to bring the course back to earth for their students. Currently, simple comparisons between MPC and common law states obscure the manner in which statutory law and case law intertwine, even as they leave students missing the close relationship between criminal codes and local norms. By contrast, focusing on the new common law enables students to see how even the most scientific of codes ultimately finds itself bending, and being bent, to suit judicial will.

One final point is worth mentioning. Though the impact of popular will on criminal statutes has been criticized by law scholars like Robinson and Stuntz, criminal law’s close tie to popular democracy remains unavoidable.<sup>275</sup> Not emphasizing this to students can lead to dire results, among them a tendency to downplay the significance of local voters, and also to miss important cultural formations that may or may not make certain litigation strategies or reform attempts unworkable. Perhaps no better example of this exists than the failure of MPC enthusiasts such as Kadish to successfully reform California’s criminal code in the 1960s—a burden the state bears to this day.

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272. Horwitz, *supra* note 269, at 450.

273. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1742 (2004); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 525–30 (2000).

274. Walker, *American Oresteia*, *supra* note 94, at 1041–52.

275. See generally Robinson, *supra* note 6.